

UNITED STATES
v.
JAMES M. MILLS

IBLA 84-685

Decided April 28, 1986

Appeal from a decision of Administrative Law Judge Robert W. Mesch canceling desert land entry I-5507.

Affirmed.

1. Desert Land Entry: Generally--Desert Land Entry: Water Supply

Where after weighing all the evidence presented at a hearing in a Government contest of a desert land entry, the Administrative Law Judge determines a desert land entryman failed to irrigate his entry in conformity to his proposed plan of operations as of the date of final proof, the entry is properly cancelled.

APPEARANCES: W. F. Ringert, Esq., Boise, Idaho, for appellant; Robert S. Burr, Esq., Office of the Solicitor, United States Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

James M. Mills has appealed the decision of Administrative Law Judge Robert W. Mesch, dated May 18, 1984, canceling his desert land entry, I-5507. Mills filed a petition for classification dated July 5, 1972, seeking to have the lands classified for entry under the Act of March 3, 1877, 43 U.S.C. § 321 (1982). His desert land application recited that appellant sought the NW 1/4 SW 1/4, S 1/2 S 1/2 of sec. 25 and the SE 1/4 NE 1/4, E 1/2 SE 1/4 of sec. 26, T. 6 S., R. 4 E., Boise Meridian, Owyhee County, Idaho, containing 320 acres. Exhibit No. 1 attached to the application indicates 300 acres of the entry is irrigable. In response to questions in Exhibit No. 2 to the application, Mills states the water requirements of the entry to be one inch per acre. He indicates the source of his water to be "Snake River via Basin Mutual Canal Company."

Appellant's entry was allowed on July 11, 1975, for 320 acres. On May 30, 1979, appellant submitted a written request for an extension of time in which to submit proof for his entry. Appellant's request stated in part:

I own shares in Basin Mutual Canal Company equalling 500 inches of water, licensed to my deeded land in Section 36,

6S-4E, B.M. I have an agreement with Basin Mutual Canal Company shareholders, dated April 30, 1974, for an additional 320 inches to be carried in Basin's canal; said agreement gives me an interest in the right of way granted by BLM to Basin, Serial Number I-3992, to install an additional penstock.

* * * * *

The water used to irrigate my present crop comes from my 500 inch right in the system. Only 400 acres are developed on my deeded lands and I do have an extra 100 inches of water.

Under the present system, using one 22 inch penstock, two 250 hp motors and one 200 hp motor, 1360 miners inches of water are pumped from the river to the canal. Idaho Power will not allow us any additional horsepower. To overcome the situation, I am installing a 16 inch penstock. Utilizing the motors in place, but reducing friction loss with the 16 inch penstock, Bill Webb of Layne Pumps assures me the system will pump 14,000 GPMs which converts to 1560 miners inches. [1/] The additional 200 inches is more than adequate for my irrigable acreage at 5/8 inch per acre.

By decision dated October 2, 1979, BLM granted an extension of time pursuant to the Act of March 28, 1908 (43 U.S.C. § 333 (1982)), for one year from the date final proof would have been required, to July 11, 1980. The decision stated in part: "Substantial compliance with your plan of irrigation and reclamation will be required at the time of final proof. The irrigation system must be fully installed and operable so that all of the irrigable land can be irrigated."

Appellant submitted his entryman's final proof testimony on August 26, 1980, before final proof officer Merle N. Good. On June 9, 1982, the Idaho State Office, Bureau of Land Management (BLM), initiated a complaint pursuant to 43 CFR 4.451, seeking the cancellation of the desert entry because:

1. The Basin Mutual Canal, the source of water for the contestee, was not at the time of final proof, able to carry the volume of water necessary to supply the licensed water rights of lands serviced by its system and also provide water for the lands of this entry.

1/ A Dictionary of Mining, Mineral and Related Terms (1968) gives the following preferred definition of "miners inch":

"The miner's inch of water does not represent a fixed and definite quantity, being measured generally by the arbitrary standard of the various ditch companies. Generally, however, it is accepted to mean the quantity of water that will escape from an aperture 1-inch square through a 2-inch plank, with a steady flow of water standing 6 inches above the top of the escape aperture, the quantity so discharged amounting to 2,274 cubic feet in 24 hours."

2. The contestee had pumping facilities located on his deeded property designed to distribute water only for his private lands. These distribution pumps were inadequate at the time of final proof to deliver enough water to serve the private lands which have a licensed water right and also the lands of this entry.

Contest Complaint at 1.

A hearing was held by Administrative Law Judge Mesch on October 20, 1983, in Boise, Idaho. In his decision, Judge Mesch made the following findings of fact, which, following review of the entire record on appeal, this Board adopts as a correct statement of the evidence before the factfinder:

1. In connection with his desert land application, Mills represented to the BLM that (a) he intended to obtain a water permit and eventually a license from the State of Idaho to appropriate 320 inches of water from the Snake River to irrigate the desert land; (b) he intended to convey the 320 inches of water to the desert land through a system operated by the Basin Mutual Canal Company; (c) he had the right to enlarge the canal, the pumping facilities, and the penstock capacity of the Basin Mutual Canal Company's system in order to obtain water for the irrigation of the desert land; (d) upon enlarging the system, he had the right to transmit 320 inches of water through the Basin Mutual Canal Company's system for the irrigation of the desert land; and (e) the right to transmit the 320 inches of water through the system was in addition to his right to obtain 500 inches of water from the system which was licensed by the State of Idaho to the Basin Mutual Canal Company for the irrigation of deeded land that he owned.

2. On the basis of Mills' representations that he intended to appropriate 320 inches of new and additional water for the irrigation of the desert land and would convey that water to the land by enlarging the facilities of the Basin Mutual Canal Company's system, the BLM classified the land as suitable for desert land entry and allowed Mill's entry.

3. Mills did not meet his representations to the BLM that he intended to enlarge the Basin Mutual Canal Company's system in order to transmit 320 inches of new water to the desert land in addition to the 500 inches of water that he was entitled to receive through the system for his deeded land.

4. At the time of final proof, the Basin Mutual Canal system, as alleged in charge No. 1 of the contest complaint, was not adequate to carry the volume of water necessary to supply the licensed water rights of the lands serviced by the company's system and also provide water to meet the irrigation requirements of Mills' desert land entry. The Basin Mutual Canal system had to produce about 12,000 gallons of water per minute to supply the

licensed water rights of the lands serviced by the system plus an additional volume to provide water for Mills' desert land entry. The system could only produce about 11,000 gallons per minute at the time of final proof. In other words, the system was not adequate to even supply the licensed water rights of the lands serviced by the system and there was no excess capacity to provide water for the desert land entry.

5. At the time of final proof, and as alleged in charge No. 2 of the contest complaint, the distribution pumps located on Mills' deeded property were not adequate to deliver the volume of water necessary to supply the licensed water right attached to Mills' deeded land and also provide water to meet the irrigation requirements of Mills' desert land entry. The two distribution pumps could produce about 3,000 gallons of water per minute. This would not even provide the 500 inches of water licensed to Mills' deeded land.

6. About two years after the statutory life of the entry expired and final proof had been made, Mills increased the capacity of the Basin Mutual Canal system by overhauling the pumps at the Snake River and by installing an additional pump at the river. About three years after final proof had been made, Mills increased the capacity of the distribution system on his deeded land by installing an additional pump.

Decision at 3 and 4. In accordance with these findings Judge Mesch concluded:

When the statutory life of the entry expired Mills did not submit satisfactory proof of the reclamation of the land substantially in accordance with the plan of contemplated irrigation submitted to the BLM as required by 43 U.S.C. § 329. He could not submit such proof because he had not, in accordance with his represented intent, enlarged the Basin Mutual Canal Company's system in order to transmit 320 inches of new water to the desert land entry in addition to the 500 inches of water licensed to his deeded land. Contrary to his representations to the BLM, Mills had not produced any water over and above the Basin Mutual Canal Company's preexisting licensed rights. Mills sought to obtain title to the desert land entry, not by following his represented plan of development in providing additional water and the means of delivering it to the entry land, but by stretching the water from his deeded land and stretching the capacity of the deeded land's distribution system to serve the desert land entry. Under the guise of a new state water permit for the desert land entry, Mills was simply planning to use water for the desert land entry that was intended and licensed for his deeded land.

Decision at 5-6. Judge Mesch thereupon cancelled Mills' entry.

In his statement of reasons on appeal, appellant contends he was entitled to assume that by granting his request for an extension of time in which to submit his proof of entry, based on the matters stated in his request,

that BLM was approving any deviation in the construction of the irrigation facilities previously approved. Appellant argues that BLM, by granting the time extension, agreed with appellant's estimates of the quantity by which the discharge capacity of the pumping system could be increased by installation of a 16-inch penstock, and with appellant's lowered assessment that five-eighths of a miner's inch per acre was adequate for irrigation of the land. Appellant contends Judge Mesch failed to recognize the distinction drawn by state law between a water right and an interest in a ditch or other facility by which water is delivered from its natural source to its place of use. This distinction is of great importance, appellant argues, because of Judge Mesch's conclusion that the water system lacks a separate capacity for serving appellant's private land and the desert entry which makes it impossible for Mills to acquire the permanent right to an adequate supply of water for the desert entry. Appellant argues that under Idaho law the same irrigation system capacity can be used to obtain two separate water rights. He further contends the decision erred when it concluded that 320 miner's inches of new water was required for the desert entry in addition to 500 inches of water licensed to appellant's private land. This conclusion, appellant contends, is contrary to the uncontradicted testimony that five-eighths of a miner's inch per acre was adequate for irrigation of the land and that only between 400 and 434 acres of the private land was being irrigated. Appellant argues that so long as he owns both private land and the desert entry there is nothing in the law of real property which prevents him from using the capacity of the irrigation system to deliver water to either the deeded land or the desert entry as required. In essence, appellant argues he has made an amendment to his entryman's application which BLM failed to consider, and that based on the amended application he has sufficient water to satisfy the desert land entry requirements and can make final proof of that fact.

Finally, appellant contends that the contest complaint is defective and should be dismissed because the BLM charges did not set forth in clear and concise language the facts constituting the grounds of contest as required by the applicable regulations 43 CFR 4.450-4(a)(4) and 4.451-2. Appellant alleges that BLM's failure to state, in its contest complaint, the essential facts hampered and prejudiced him in the preparation of his defense. Administrative Law Judge Mesch responded fully to this allegation in his May 18, 1984, decision, stating:

There is no merit to this contention. Mills was or should have been fully aware of the BLM's position as a result of questions propounded to him at the time of final proof. Mills' counsel was or should have been fully aware of the BLM's position as a result of reading the final proof testimony of Mills and as a result of settlement negotiations conducted with the BLM. If Mills' counsel was not aware of the BLM's position in this matter, which is stated in simple straight-forward language in the contest complaint, he had adequate opportunity to ascertain the BLM's position during settlement negotiations or by requesting a prehearing conference.

We adopt Judge Mesch's ruling on this procedural issue.

The Office of the Solicitor representing BLM has also briefed this appeal. The Solicitor's reply brief filed with the administrative law judge characterizes the crucial evidence concerning irrigation of the desert entry presented by the parties:

When the entryman produced an irrigation plan in order to convince the BLM that he could obtain a right from the State of Idaho to acquire a permanent sufficient source of water for this entry, he provided the Bureau a state water permit that allowed him to bring water from the Snake River to his desert land entry in the amount of up to 320 miner's inches. In order to utilize the facilities of the Basin Mutual Canal system to divert this water to his entry, he provided an agreement from the Canal Company that allowed him to develop an additional capacity in the system so that he could carry up to 320 inches of water in it for his entry. At the time of final proof, Mr. Mills had not been successful in bringing the capacity of the Basin Mutual Canal system up to the company's licensed demand. Since Mr. Mills has not been able to develop any water under his permit to put through the Basin Mutual Canal Company system, he has not been able to show that he has developed a permanent adequate source of water for his entry in accordance with his reclamation plan. The question of whether Mr. Mills can utilize water developed by the Basin Mutual Canal Company for his desert land entry is not before us. Although as a practical matter the entryman has obviously used this water that is licensed to the Basin Mutual Canal Company and appurtenant to his deeded lands, he has not made a request to the Bureau to change his irrigation plan and received its approval for the company to become a source of water for his entry. The Basin Mutual Canal Company has never petitioned the Bureau to be recognized as a source of water for the entry and the State of Idaho has never been approached with an application to transfer the water right appurtenant to these deeded lands over to the lands of the entered land. Under these circumstances, the hypothetical discussion of what would be the status of the water supply to this desert land entry if any or all of these things had been done by the entryman before final proof is irrelevant. The Desert Act requires that the entryman provide a permanent sufficient source of water for lands of his desert land entry and the utilization of waters held by a third party and licensed on other lands certainly does not satisfy this criteria.

Solicitor's Brief filed with the Administrative law judge at 11-12.

[1] The Solicitor's discussion of this issue correctly defines the ultimate question on appeal. 2/ Pursuing a similar line of reasoning, Judge Mesch correctly found appellant's desert land entry should be cancelled.

2/ Appellant has filed an offer of proof and motion to remand seeking the opportunity to offer evidence to show the capacity of the Basin Mutual Canal

In his application appellant states it was his intention to transmit, by enlarging the Basin Mutual Canal Company's system, 320 miner's inches of water onto the entry above and beyond the 500 miner's inches of water licensed to his deeded land. In order to transmit an additional 320 miner's inches of water onto his entry appellant obtained a permit from the State of Idaho. However, at the time of final proof appellant had not made necessary modifications to his distribution system to permit the additional water to be carried to the desert land. At least in part, as appellant has pointed out, his inability to increase the capacity of his system was caused by refusal of the supplier of his electricity to increase the electric power supply. Not until 1984 was he apparently able to obtain significantly more energy, allowing him to add two more pumps to his system. This late modification is not sufficient, however, to enable appellant to qualify his entry under the governing law.

The applicable regulation, 43 CFR 2521.6(h)(3), states in relevant part:

The final proof, therefore, must show that the claimant has exercised such diligence as will * * * result in his definitely securing a perfect right to the use of sufficient water for the permanent irrigation and reclamation of all of the irrigable land in his entry. To this end the proof must at least show that water which is being diverted from its natural course and claimed for the specific purpose of irrigating the lands embraced in claimant's entry, * * * has actually been conducted * * * upon the land; * * * that water has been brought to such a point on the land as to readily demonstrate that the entire irrigable area may be irrigated from the system; * * *.

Not only did appellant fail to offer proof, at the time his entry was at its statutory end, to establish the required diversion had taken place, but his evidence at final proof tended to show, to the contrary, that his distribution system was inadequate to handle water so as to supply irrigation to the desert entry claimed by him.

Appellant's contention now advanced, that he is entitled to use all or a portion of the water licensed to his deeded land to also irrigate his desert entry, does not establish compliance with the law. The regulation cited clearly requires that water which is being diverted from its natural course to desert land must be for the specific purpose of irrigating the lands embraced in the desert land entry to be served. See, e.g., United States v. Swallow, 74 I.D. 1 (1967). The desert land entry would not have

fn. 2 (continued)

system through testimony from Sherl L. Chapman. Chapman testified at the hearing held in this case on Oct. 20, 1983. The affidavits in support of the motion indicate it is based upon modifications to the system made in 1984, several years following the receipt of the entryman's final proof. It is clear that this offered testimony is not relevant to this appeal which concerns the capacity of the system to serve appellant's desert land entry during its statutory duration, which ended in August 1980. The motion is denied.

been allowed by BLM if appellant had declared his intent to irrigate the land with water diverted from the water right appurtenant to his deeded land (Tr. 65). The regulation requiring an adequate supply of water for the desert land entry is interpreted by BLM to prohibit reliance on a water right appurtenant to other lands, unless there is a legal commitment of that water from the other lands for use on the entered lands (Tr. 66-67). Ron Grant, a BLM employee, explained that the water committed to appellant's deeded land would not be available for the desert land entry if someone other than appellant owned the deeded tract (Tr. 66-67). The significance of this conclusion was underscored by the testimony of George Astle, who leased the deeded tract from appellant in 1977 through 1980, and who had obtained an injunction in 1980 to retain enough water for use on the deeded land under lease. The record establishes that appellant had failed by the time of final proof to increase the capacity of the Basin Mutual Canal Company above its previously committed usage so as to establish a water right as called for in his development plan (Tr. 56, 134, 151).

All the evidence concerning the distribution of water from the Basin system tends to support Judge Mesch's conclusion that appellant tried, unsuccessfully as it turned out, to stretch an existing irrigation system dedicated to other land to include the desert entry. Clearly, at the time of final proof, his distribution system was wholly inadequate to provide more than the 500 miner's inches allocated to his deeded land, which it was primarily designed to serve. Because appellant failed to develop the planned scheme of irrigation for his desert entry, in accordance with his entry application, it was properly cancelled. 3/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

James L. Burski
Administrative Judge

3/ As to whether, upon proper application, appellant would be eligible for equitable adjudication under 43 CFR 1871.1-1, see Rene P. Lamoreaux, 20 IBLA 243 (1975).

